



## PARENTAL LEAVE – ICB FACTSHEET

### HOW HAS THE LAW RECENTLY CHANGED?

In 2020 the Fair Work Act 2009 was amended to introduce an entitlement to “flexible parental leave”. This allows an employee to take up to 30 days of their parental leave entitlement at any time up to the 2nd birthday of their child - even after they have returned back to work.

Other amendments made in 2020 included greater entitlements to take parental leave due to the still-birth of a child and greater flexibility for parents caring for babies born prematurely or with other birth-related complications.

### WHAT IS THE ENTITLEMENT TO PARENTAL LEAVE?

Under the National Employment Standards (NES) in the Fair Work Act 2009 an eligible employee is entitled to unpaid parental leave, which includes birth-related leave and adoption-related leave. The leave must be associated with the birth of a child to the employee, the employee’s spouse or the employee’s de-facto partner, or the placement of a child under 16 years of age with the employee for adoption.

Eligible employees can initially take up to 12 months parental leave, provided they have at least 12 months continuous service with the employer before the expected date of birth of the child or before the date of placement of an adopted child.

For casual employees to be eligible, they must have 12 months continuous service on a regular and systematic basis and have a reasonable expectation of continuing employment on this basis.

Each eligible member of an “employee couple” may take a separate period of up to 12 months of unpaid parental leave provided they have responsibility for the care of the child. An employee couple is where two employees are in a spousal or de-facto relationship (including same-sex couples).

Employees may seek an extension of leave for a further 12 months after the initial 12 month period, but the total leave taken between an employee couple cannot be more than 24 months.

Employees who are taking parental leave to care for an adopted child are also entitled to two days unpaid pre-adoption leave to attend relevant interviews or examinations. This leave can't be used if an employer tells an employee to take another type of leave (eg. paid annual leave).

### HAVING ANOTHER CHILD

Employees who have taken parental leave don't have to work for another 12 months before they can take another period of parental leave with that same employer.



## WHAT ARE THE DOCUMENTATION REQUIREMENTS?

An employee must, wherever practicable, provide 10 weeks' notice of the intention to take leave, specifying the start and end dates of the parental leave and providing reasonable evidence, such as a medical certificate, verifying the expected date of birth of the child (or the date of placement of the child if taking adoption leave).

At least 4 weeks before the intended start date, the dates of the leave should be confirmed with the employer and the employee should advise of any changes to these dates.

Employees who are taking "concurrent leave" (parents taking leave at the same time – see further below) need to provide at least 10 weeks' notice to their employer for their first period of concurrent leave. For second and later periods, they need to provide at least 4 weeks' notice.

If an employee can't provide these notice periods, they need to provide as much notice as possible.

### Flexible parental leave

An employee who wants to take flexible parental leave (see below) needs to tell their employer:

- at the same time they give notice of their continuous parental leave, or
- at least 10 weeks before the start of their flexible parental leave, if they're only taking flexible parental leave (and no continuous parental leave).

Notice can also be provided later if the employer agrees.

When they give notice, an employee needs to tell their employer the total number of days of flexible parental leave they intend to take. An employee can take up to 30 days of flexible parental leave in total.

An employee must confirm their flexible parental leave dates with their employer at least 4 weeks before they start their leave. If there have been any changes to the dates, the employee should tell their employer as soon as possible.

### Pre-adoption leave

Employees who are taking pre-adoption leave have to give their employer notice that they are taking leave as soon as possible. They should also tell their employer how long they expect to be on leave.

## HOW IS PARENTAL LEAVE TAKEN?

There are complex rules about when an employee can take unpaid parental leave for the birth or adoption of a child. This depends on whether the leave is:

- continuous unpaid parental leave
- flexible unpaid parental leave.

There are also different rules depending on if:



- one or both parents are taking leave
- both parents take parental leave at the same time, or
- both parents take parental leave at different times

#### **Continuous parental leave: One parent taking parental leave**

When one parent takes unpaid parental leave, they can take up to:

- 12 months, or
- 24 months, if their employer agrees to an extension (such agreement cannot be unreasonably refused – see below).

The leave can be taken as:

- a single continuous period, or
- a single continuous period and a flexible period of up to 30 days.

Where the pregnant person is the one taking parental leave it has to start:

- on the birth of the child, or
- up to 6 weeks before the expected birth (or earlier if the employer agrees).

Where an adoptive parent is taking parental leave it has to start on the date of placement of the child.

If the employee who isn't pregnant is the parent taking the unpaid parental leave, the leave must start on the date of birth of the child, and can only start after the birth of the child if:

- the employee who is the partner has responsibility for the care of the child, and
- their pregnant partner isn't employed.

The leave has to be taken within 12 months after the birth or placement of the child.

#### **Continuous parental leave - Both parents taking leave**

Parents who are married or in a de facto relationship can take up to 8 weeks unpaid parental leave at the same time. This is called 'concurrent leave'.

Concurrent leave can start:

- on the birth or placement of the child
- earlier than this date, if the employer agrees, or
- later than this date, but it has to be within 12 months of the birth or placement of the child.

Concurrent leave can be taken in separate periods. Each period needs to be at least 2 weeks long; however, an employer can agree to shorter lengths.



Concurrent leave is part of an employee's total unpaid parental leave entitlement. This means that any concurrent leave taken is deducted from the total unpaid parental leave entitlement.

Alternatively, parents can choose to each take their parental leave at different times. Where this happens each parent can take a separate period of up to 12 months unpaid parental leave. The combined leave cannot be for more than 24 months.

If an employee who is pregnant takes unpaid parental leave first, it has to start:

- when the child is born, or
- up to 6 weeks before the expected birth (or earlier if their employer agrees).

When the employee who isn't pregnant takes unpaid parental leave first, it needs to start on the birth or placement of the child.

If the leave is for an adoption, one parent needs to start their leave period on the date of placement of the child.

Unpaid parental leave usually has to be taken in a single continuous period. This means the other parent may need to start their unpaid parental leave the next working day after the first parent's leave ends. There are some exceptions to this, including for flexible unpaid parental leave (see below).

#### **Flexible parental leave: One parent taking parental leave**

An employee can take up to 30 days of their 12 month unpaid parental leave flexibly up to their child's second birthday or the second anniversary of their adopted child's placement.

Flexible unpaid parental leave can be taken as:

- a single continuous period of one day or longer
- separate periods of one day or longer each

Flexible unpaid parental leave can be taken within the first 24 months of the birth or placement of an adopted child. However, the employee's entitlement to unpaid parental leave, except for flexible unpaid parental leave, will end on the first day that the employee takes flexible unpaid parental leave. This means that if an employee is planning on taking a continuous period of unpaid parental leave, they should do so before they take any flexible unpaid parental leave.

An employee can take flexible unpaid parental leave after taking one or more periods of continuous unpaid parental leave. The total of both periods can't be longer than 12 months.

#### **One parent taking flexible leave & one parent taking continuous parental leave**

An employee may be able to take flexible unpaid parental leave on the same day as the other parent is on unpaid parental leave. The two employees can only take a total of up to 8 weeks of unpaid parental leave at the same time.



## CAN EMPLOYEES REDUCE THEIR PERIOD OF PARENTAL LEAVE?

An employee can request to reduce the period of unpaid parental leave with the employer's agreement, but there is no obligation on the employer to agree. There are special rules due to stillbirth or death of a child (see further below).

## CAN THE INITIAL PERIOD OF UNPAID PARENTAL LEAVE BE EXTENDED?

Where an employee initially applies for and commences less than 12 months parental leave, they may seek to extend the leave up to a period of 12 months, (less any concurrent leave or "paid no safe job leave").

Applications for extension of parental leave must be made at least four weeks prior to the initial end date for the parental leave. The employer must approve the first request for an extension. Any requests for further parental leave (up to the end of the first 12 month period) are at the employer's discretion.

## WHAT HAPPENS IF THE EMPLOYEE REQUESTS AN EXTENSION BEYOND 12 MONTHS PARENTAL LEAVE?

Employees are entitled to request a further 12 month period of parental leave.

The employee must apply in writing at least 4 weeks before the end of the first parental leave period. If the employee is a member of an employee couple, they must indicate the amount of unpaid leave that the other member has or will take as this reduces the maximum 12 month extension period.

The employer must respond to the request in writing within 21 days giving reasons for any refusal. The request may only be refused on reasonable business grounds.

The NES does not define reasonable business grounds for the purposes of requests for an additional 12 months of parental leave however relevant factors may include:

- The effect on the workplace and the employers business of approving the request, including the financial impact and the impact on efficiency, productivity and customer service;
- The inability to organise work among existing staff; and
- The inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

## SICK LEAVE FOR PREGNANT EMPLOYEES

Employees who are pregnant still get their ordinary sick leave entitlements while they're at work.

Pregnancy is not considered an illness or injury; however, if a woman experiences a pregnancy-related illness or injury, sick leave can be taken.



## SPECIAL MATERNITY LEAVE FOR PREGNANT EMPLOYEES

A pregnant employee who is eligible for unpaid parental leave can take a period of unpaid Special Maternity Leave (SML) where she has a pregnancy related illness or where her pregnancy ends after at least 12 weeks because of a miscarriage or termination (there are separate entitlements where a baby is stillborn).

If an employee takes SML because of a pregnancy-related illness, the leave will end when the pregnancy or illness ends, whichever is earlier. If she takes leave because of a miscarriage or termination, it can continue until she is fit for work.

A permanent employee can choose to take paid sick leave (if they have such leave accrued) instead of unpaid SML.

Notice of the intention to take SML must be provided to the employer as soon as practicable. An employer may require evidence such as a medical certificate.

Any subsequent unpaid parental leave taken is not affected by the amount of SML taken by the employee.

## TRANSFER TO A SAFE JOB FOR PREGNANT EMPLOYEES

All pregnant employees are entitled to transfer to a safe job regardless of their length of service with the employer. However, only employees with at least 12 months' continuous service who are eligible for unpaid parental leave under the NES are entitled to "**paid** no safe job leave".

**Where a safe job is available:** Where a pregnant employee has fulfilled the notice requirements re: her pregnancy and provides medical evidence that she is fit for work but that it is inadvisable for her to continue in her current job during a stated period (the "risk period") because of illness or risks arising out of the pregnancy, the employee may seek a transfer to a safe job. The employer must transfer the employee to the safe job if one is available, on the same terms and conditions, for the risk period.

An appropriate safe job is a safe job that has:

- The same ordinary hours of work as the employee's present position; or
- A different number of ordinary hours agreed to by the employee.

If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.

If the employee's pregnancy ends before the end of the risk period, the risk period ends when the pregnancy ends.

**Where no safe job is available:** Where no safe job is available, an employee's entitlements will depend on the employee's length of continuous service with the employer, as set out below.

"Paid no safe job leave" is where there is no safe job available and:



- The employee has at least 12 months' continuous service and is eligible for unpaid parental leave under the NES; and
- The employee has complied with the notice and evidence requirements for taking unpaid parental leave

If the employee takes "paid no safe job leave" for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period. For a casual, no safe job leave is paid at the base rate of pay (not including the casual loading) for the average number of hours they would have worked in the period they're on leave.

"Unpaid no safe job leave" is where there is no safe job available and:

- The employee has less than 12 months' continuous service and is not eligible for unpaid parental leave under the NES; and
- The employee has given the employer evidence that would satisfy a reasonable person of the pregnancy

Both types of no safe job leave can be taken up to the date of birth of the child.

#### DIFFERENCE BETWEEN SPECIAL MATERNITY LEAVE AND TRANSFERRING AN EMPLOYEE TO A SAFE JOB

With Special Maternity Leave (SML), the employee is not able to work at all because of a pregnancy related illness.

With the transfer to a safe job entitlement, the employee is fit to work in the opinion of a registered medical practitioner, but that it is inadvisable for her to continue in her present position for a stated period because of:

- Illness or risks, arising out of the pregnancy; or
- Hazards in connection with that position.

SML is a period of unpaid leave (the employee is not working) whereas the transfer to a safe job entitlement requires that, where a safe job is available, an employee will continue to be paid (as they are still working, albeit in a different "safe job" role).

If the employer does not think it is reasonably practicable to transfer the employee to a safe job, that is when the entitlement to "paid no safe job leave" can arise for eligible employees with more than 12 months' continuous service. For employees who are not eligible for unpaid parental leave (with less than 12 months' continuous service), "no safe job leave" will be unpaid.

#### EMPLOYEES WHO WANT TO WORK IN THE 6 WEEKS BEFORE THEIR DUE DATE

If a pregnant employee wants to work in the 6 weeks before her due date her employer can ask for a medical certificate within 7 days that states:

- she can continue to work
- it's safe for her to do her normal job.



If the certificate says she's fit for work but it isn't safe for her to continue in her normal job, then the employee will be entitled to a safe job or no safe job leave.

If she doesn't provide a medical certificate or the certificate says she can't continue work at all then the employer can direct her to start unpaid parental leave.

An employee's unpaid parental leave starts when she is directed to take unpaid parental leave and will count as part of the employee's total unpaid parental leave entitlement.

If the employee planned to take parental leave at a later date after the birth, the period of directed leave doesn't have to be taken in a continuous period with the other parental leave.

#### CAN AN EMPLOYEE TAKE OTHER FORMS OF PAID LEAVE WHILE ON PARENTAL LEAVE?

An employee may take paid annual leave within the parental leave period. However they cannot take paid personal/carer's leave or compassionate leave. They may also be able to take long service leave subject to applicable State or Territory legislation.

Taking such leave will not extend the period of unpaid parental leave.

#### CONSULTATION WITH AN EMPLOYEE ON UNPAID PARENTAL LEAVE

If, while an employee is on unpaid parental leave, the employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position, the employer must take all reasonable steps to consult with the employee about the effect of the decision on their position.

#### TRANSFER OF EMPLOYMENT

Where an employee is on parental leave and their employment is transferred to a new employer, they may continue the leave. If they have provided notice of intended leave to the first employer, the entitlement must be assumed by the second employer.

#### HIRING SOMEONE TO COVER PARENTAL LEAVE

Where the employer is taking on a replacement employee to do the work of another employee who is taking a continuous period of leave, the employer must:

- Tell the replacement employee that the engagement to do the work is temporary, and
- What the rights of the employee taking the parental leave are when they return to work after the period of leave.

There is a specific form of wording that should be used to meet these obligations (ideally in the employee's contract of employment).



## EMPLOYEE'S RIGHT TO TERMINATE THEIR EMPLOYMENT DURING PARENTAL LEAVE

An employee may terminate their employment at any time during a period of parental leave subject to any notice required to be given by the employee to the employer.

## EMPLOYEE'S RIGHT TO RETURN TO THEIR JOB AFTER PARENTAL LEAVE

An employee returning to work after a period of parental leave is generally entitled to return to the position that they held immediately before the period of leave. If that position no longer exists and the employee is qualified and able to work in another available position for the employer, the employee is entitled to work in that other position.

If no such suitable job exists it may be possible to terminate an employee's employment on the grounds of redundancy, however particular care must be taken to avoid exposure to a claim, for example under discrimination law.

## CAN EMPLOYEES CHOOSE TO RETURN TO WORK ON A PART-TIME BASIS?

Employees returning from parental leave are entitled to make a flexible working request which may include a variation of hours, working from home, etc.

If the employer receives such a request in writing they must respond in writing within 21 days indicating whether or not they agree and the reasons for any refusal. Such a refusal can only be made on reasonable business grounds.

Reasonable business grounds for refusing a request for flexible working arrangements include but are not limited to:

- the new working arrangements requested by the employee would be too costly for the employer
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee
- the new working arrangements requested by the employee would be likely to result in significant loss of efficiency or productivity
- the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

## GOVERNMENT PARENTAL LEAVE PAY SCHEME & DAD AND PARTNER PAY

The Federal Government provides a means-tested entitlement for eligible employees who are the primary carer of a newborn or newly adopted child. Parental Leave Pay ('PLP') is up to 18 weeks' pay, which is paid at the National Minimum Wage. This is usually paid by the Government to the employer, who passes it on to the employee. For more information please visit [Services Australia](https://www.servicesaustralia.gov.au).



Eligible employees can claim PLP for one set period and (following changes to the law in 2020) one flexible period.

### **First period - set Parental Leave Pay**

The first PLP period is a set period of 12 weeks. This has to be used in one continuous period within 12 months of the birth or adoption of a child.

### **Second period - flexible Parental Leave Pay**

The second PLP period allows an employee to use up to 30 days of flexible PLP. The flexible PLP period:

- can be taken in flexible periods as negotiated by the employee with their employer
- has to be taken within 24 months of the birth or adoption of a child
- usually starts after the first PLP period ends.

### **Using flexible Parental Leave Pay**

Employees who want to use flexible PLP when they return to work from parental leave need to come to an agreement with their employer about how it will work in their circumstances. Employees and employers can consider:

- reducing the hours or days of work
- changing the pattern of work
- taking additional unpaid leave

Employees can use PLP before, after or at the same time as their paid and unpaid entitlements such as annual leave, long service leave and unpaid parental leave.

### **Dad and Partner Pay**

Eligible working dads and partners (including same-sex partners) get 2 weeks leave paid at the National Minimum Wage, provided that they are not working in this period or on a period of paid leave. These payments are made directly to the employee by the Australian Government. An employer's role in respect of Dad & Partner Pay is usually to grant employees unpaid leave so that they can receive this entitlement. For more information please go to [Services Australia](#).

## **EMPLOYER-FUNDED PAID PARENTAL LEAVE BENEFITS**

Employers can choose – although there is no legal obligation – to provide employees with paid parental leave entitlements. If an employer does implement such a policy it will not impact an employee's ability to claim Government Parental Leave Pay, ie they can be entitled to both at the same time.



## PARENTAL LEAVE FOR STILLBIRTH, PREMATURE BIRTH OR INFANT DEATH

An employee who experiences a stillbirth or the death of a child during the first 24 months of life can take unpaid parental leave.

Employees can take up to 12 months' unpaid parental leave if they experience:

- a stillbirth
- the death of a child during the first 24 months of life.

After a stillbirth or death of a child, employees can't:

- be called back to work
- have any unpaid parental leave cancelled by their employer.

Employees can choose to return to work after experiencing a stillbirth or death of a child. If they decide to return to work after starting unpaid parental leave, they need to give their employer at least 4 weeks' written notice before returning. If they haven't started leave, they just need to give written notice about their return to work. Employers and employees can agree to the employee returning to work on an earlier date.

### Taking compassionate leave

After experiencing a stillbirth or death of a child, an employee parent may be entitled to take compassionate leave while on unpaid parental leave. Another employee may also be entitled to take compassionate leave if the infant was, or would have been, an immediate family or household member of the employee.

### Premature birth and birth-related complications

Employees who experience premature births or other birth-related complications that result in their newborn having to stay in hospital or being hospitalised immediately after birth can agree with their employers to put their unpaid parental leave on hold.

This means that while their newborn is hospitalised, parents can return to work and the period when they are back at work will not be deducted from their unpaid parental leave. The employee can then resume their unpaid parental leave at the earliest of:

- a time agreed with their employer
- the end of the day when the newborn is discharged from the hospital, or
- if the newborn dies, the end of the day when the newborn dies.



## ABOUT EMPLOYMENT INNOVATIONS

Employment Innovations is one of Australia's leading providers of employment services designed to increase productivity and ensure compliance. Its services and solutions include all the tools that every Australian small to medium sized employer needs – including [workplace advice](#), [payroll solutions](#), [migration services \(visas/sponsorship\)](#), [human resource management](#) and [HR software](#). Our partner firm [EI Legal](#) provides legal advice and representation.

## ABOUT ICB'S PARTNERSHIP WITH EMPLOYMENT INNOVATIONS

All ICB members get three free telephone / email queries per year about any HR / employment law matter. Just email: [hr@employmentinnovations.com](mailto:hr@employmentinnovations.com) or call 1300 724 500.

In addition, ICB members can subscribe for unlimited advice for only \$49 per month or \$495 per year (plus GST). Any ICB member's clients can get a free call-back on any employment issue (unlimited number of clients can use this service). Just contact Employment Innovations using the contact details above.

## DISCLAIMER

The information provided in this article is general in nature and is not intended to substitute for professional advice. If you are unsure about how this information applies to your specific situation we recommend you contact Employment Innovations for advice.